IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-527

EDWARD H. LOWE, ET AL,
Petitioners,

versus

CITY OF JACKSON, MISSISSIPPI,
Respondent.

On Petition for Writ of Certiorari
to the Mississippi Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The Opinion of the Chancery Court of the First Judicial District of Hinds County, Mississippi is set out in the Petitioners' Appendix A beginning at page

A-12. The Opinion of the Supreme Court of the State of Mississippi, reported at 336 So.2d 490, is set out in the Petitioners' Appendix A at page A-1. The decision turned upon the lower Court's determination, based upon the massive amount of evidence adduced at the lengthy hearing of this cause, that the annexation, as modified by the Court, was reasonable. This case has been thoroughly considered by two courts, both of which found in favor of Respondent.

JURISDICTION

Petitioners attempt to invoke the jurisdiction of this Court under 29 U.S.C. 1257 (3), however, the Respondent would point out that there is no such statute. Respondent would assume that since the Petitioners are seeking a writ of certiorari, that Petitioners' petition should reflect 28 U.S.C. 1257 (3) as the statute under which they attempt to invoke the jurisdiction of this Court.

QUESTIONS PRESENTED

I.

Whether the criteria are present which are concomitant with United States Supreme Court review by certiorari.

A. Whether there is any special or important reason for the review of the decision of the Mississippi Supreme Court.

B. Whether there is a substantial federal question.

STATUTES INVOLVED

Sections 21-1-27, 21-1-29, 21-1-31, 21-1-33, 21-1-35, 21-1-37, 21-1-39, and 21-1-41 **Miss. Code Ann.** (1972), which statutes govern the extension or contraction of corporate boundaries in Mississippi.

STATEMENT OF THE CASE

The decision of the Supreme Court of the State of Mississippi, which the Petitioners request that this Court review, is a decision involving the routine municipal annexation of adjacent unincorporated territory to the City of Jackson, Mississippi. The Respondent, City of Jackson, Mississippi, adopted an ordinance on August 27, 1974, extending and enlarging the boundaries of the City of Jackson. Subsequent to the adoption of said ordinance, the City of Jackson filed its petition for ratification, approval and confirmation of the ordinance as required by Section 21-1-29 **Miss. Code Ann.** (1972)[1], attaching to said petition a

1 Section 21-1-29 **Miss. Code Ann.** (1972) reads:

> When any such ordinance shall be passed by the municipal authorities, such municipal authorities shall file a petition in the chancery court of the county in which such municipality is located; however, when a municipality wishes to annex or extend its boundaries across and into an adjoining county such municipal authorities shall file a petition in the chancery court of the county in which such territory is located. The petition shall recite the fact of the adoption of such ordinance and shall pray that the enlargement or contraction of the municipal boundaries, as the case may be, shall be ratified, approved and confirmed by the court. There shall be attached to such petition, as exhibits thereto, a certified copy of the ordinance adopted by the municipal authorities and a map or plat of the municipal boundaries as they will exist in event such enlargement or contraction becomes effective.

copy of the ordinance, Exhibit "A" thereto, and a map, Exhibit "B" thereto, showing the City of Jackson and the area proposed for annexation. Pursuant to Section 21-1-31 **Miss. Code Ann.** (1972)[2], notice of the hearing on the City's petition was given so that all parties either affected or aggrieved by the proposed annexation could appear at the hearing and present their objections to the annexation.

The lower Court hearing, held pursuant to Section 21-1-33 **Miss. Code Ann.** (1972), consumed 17 weeks, 16 volumes of testimony, exhibits and pleadings and some 57 witnesses. The Chancery Court of the First Judicial District of Hinds County, Mississippi, Division II thereof, thereafter entered its opinion and final decree ratifying, approving and confirming the ordinance, as modified by the Court, enlarging the boundaries of the City of Jackson (Appendix A to petition, pages A-12 through A-24).

From that final decree, the Petitioners, some of the

2 Section 21-1-31 **Miss. Code Ann.** (1972) reads:

> Upon the filing of such petition and upon application therefor by the petitioner, the chancellor shall fix a date certain, either in term time or in vacation, when a hearing on said petition will be held, and notice thereof shall be given in the same manner and for the same length of time as is provided in section 21-1-15 with regard to the creation of municipal corporations, and all parties interested in, affected by, or being aggrieved by said proposed enlargement or contraction shall have the right to appear at such hearing and present their objection to such proposed enlargement or contraction. However, in all cases of the enlargement of municipalities where any of the territory proposed to be incorporated is located within three miles of another existing municipality, then such other existing municipality shall be made a party defendant to said petition and shall be served with process in the manner provided by law, which process shall be served at least thirty days prior to the date set for the hearing.

Objectors in the Chancery Court, appealed to the Supreme Court of the State of Mississippi. The decree of the Chancery Court of the First Judicial District of Hinds County, Mississippi hereinabove referred to was affirmed by the Supreme Court of the State of Mississippi on July 27, 1976 (*Edward H. Lowe, et al v. City of Jackson, Mississippi*, 336 So.2d 490 (Miss. 1976), Appendix A to petition, pages A-1 through A-6). The judgment of the Supreme Court of Mississippi found that the statute under constitutional attack, Section 21-1-27 **Miss. Code Ann.** (1972) was in fact constitutional and did not deny the Objectors, appellants therein, equal protection as guaranteed by the United States Constitution. In addition, the Court stated that the lower Court, after hearing the conflicting testimony and evidence, had accepted that offered on behalf of the City of Jackson, and in the judgment of the Supreme Court of Mississippi, the evidence offered on behalf of the City of Jackson was substantial and formed a sufficient basis to support the decree of the lower Court. The Supreme Court concluded in its opinion that the decree of the trial Court was supported by substantial evidence, was not manifestly wrong or against the weight of said evidence, and, therefore, the Chancellor's decree had to be affirmed.

REASONS FOR DENYING THE WRIT

I.

None Of The Criteria Are Present Which Are Concomitant With United States Supreme Court Review By Certiorari.

The Respondent strongly urges that the present case is not a proper case for review by this Court on a writ

of certiorari. This case has no commanding constitutional issues and is merely a local matter involving questions of state law and procedure.

A. There Is No Special And Important Reason For Review Of The Mississippi Supreme Court's Decision

Rule 19(1) of the Rules of the Supreme Court of the United States specifically states that a review on writ of certiorari "is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor." The Mississippi Supreme Court has thoroughly reviewed the record in this case and has determined that the trial court's decision ratifying and approving the annexation proceedings should be affirmed. The only error alleged by Petitioners, which error was presented to the courts below and which has been passed upon by the Court before, is one which involves purely state procedure and practice and does not raise a substantial federal question. The Mississippi municipal annexation statutes (§21-1-27 *et seq*. **Miss. Code Ann.** (1972)) allow anyone who is aggrieved or adversely affected by the annexation proceedings the right to file a protest with the Chancery Court of proper jurisdiction and fully state his objections and offer evidence in support thereof to the Court. If he should be unsuccessful there, he has the right of appeal with supersedeas to the Mississippi State Supreme Court

by posting a bond in the amount of $500.00. §§ 21-1-21[3] and 21-1-37[4] **Miss. Code Ann.** (1972).

B. Petitioners' Petition Fails To State A Substantial Federal Question

The Petitioners' allegation that the Mississippi statute for enlarging municipal boundaries is unconstitutional does not present a substantial federal question. The position of the Petitioners in this matter, succinctly stated, is that they have been denied equal protection of the law as guaranteed by the Constitution of the United States since Section 21-1-27 **Miss. Code Ann.** (1972) (set out in full at pages 5 and 6 of the petition) does not afford them the right to vote by petition or otherwise on a proposed annexation. The

3 Section 21-1-21 **Miss. Code Ann.** (1972) reads:

> Any person interested in or aggrieved by the decree of the chancellor, and who was a party to the proceedings in the chancery court, may prosecute an appeal therefrom to the supreme court within ten days from the date of such decree by furnishing an appeal bond in the sum of five hundred dollars with two good and sufficient sureties, conditioned to pay all costs of the appeal in event the decree is affirmed. Such appeal bond shall be subject to the approval of the chancery clerk and shall operate as a supersedeas. If the decree of the chancellor be affirmed by the supreme court, then such decree shall go into effect after the passage of ten days from the date of the final judgment thereon, and the party or parties prosecuting such appeal and the sureties on their appeal bond shall be adjudged to pay all costs of such appeal.

4 Section 21-1-37 **Miss. Code Ann.** (1972) reads:

> If the municipality or any other interested person who was a party to the proceedings in the chancery court be aggrieved by the decree of the chancellor, then such municipality or other person may prosecute an appeal therefrom within the time and in the manner and with like effect as is provided in section 21-1-21 in the case of appeals from the decree of the chancellor with regard to the creation of a municipal corporation.

Petitioners' allegation that they have been denied due process rights guaranteed by the Fourteenth Amendment to the United States Constitution does not present to this Court a substantial federal question as required by Rule 19 (1) (a) of the Rules of the Supreme Court of the United States.

Almost 70 years ago, this Court, in the case of *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) ruled against the arguments which are now set forth by the Petitioners. The Respondent strongly urges that *Hunter* is dispositive of the issues raised by the Petitioners. In *Hunter*, the Court was faced with a Pennsylvania act authorizing the consolidation of two cities upon a majority vote of the electors in the combined cities. A majority vote of the total votes cast in the two cities of Allegheny and Pittsburgh were in favor of a consolidation, but a majority of the votes cast in the smaller city of Allegheny opposed it. The citizens of Allegheny objected, contending that the Pennsylvania act unconstitutionally deprived them of their property without due process of law. The Supreme Court, however, rejected these objections and affirmed the State Court, stating:

> . . . Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them for the purpose of executing these powers properly and efficiently. They usually are given the power to acquire, hold and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the

territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any laws conferring governmental powers or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All of this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all of these respects, the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal Constitution which protects them from these injurious consequences. The power is in the state and those

> who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

(207 U.S. 161, at 179).

Hunter v. City of Pittsburgh made it clear that municipalities such as the City of Jackson are creatures of the legislature of the State and as such are entirely subject to legislative will. The Mississippi legislature has enumerated in Sections 21-1-27, *et seq.* **Miss. Code Ann.** (1972) the manner and procedure in which a municipality such as the City of Jackson may enlarge its boundaries by way of annexation. If a municipality desires to enlarge its boundaries, it must proceed under the dictates of Sections 21-1-27, *et seq.* The Mississippi legislature has, therefore, by the enactment of this Section, made it unnecessary for a municipality to obtain the consent of the qualified electors either in the municipality wishing to annex adjacent territory or in the area proposed for annexation. The granting to a municipality acting by and through its governing elective legislative body, of the power to annex land under specified conditions, even without consent of the property owners in the area proposed for annexation, as we have here, has been reviewed by courts on numerous occasions and upheld in a long line of cases. 2E **McQuillen, Law of Municipal Corporations**, § 7.16 (3rd rev. ed. 1966). In addition, it is equally well-settled that the power to annex may be exercised over inhabitants of a proposed annexation area, not only without their consent, but even over their objection and protest. 2E McQuillen, *supra*, § 7.16 and cases cited therein.

In the case of *Bridges v. City of Biloxi, Mississippi*, Cause Number 923, filed in the October, 1965 term of this Court and reported at 383 U.S. 574 (1966), the questions concerning this particular statute, Section 21-1-27 **Miss. Code Ann.** (1972) (formerly § 3375-10 **Miss. Code Ann.** (1942)) were presented to and considered by this Court. The appellant in *Bridges* listed in her jurisdictional statement, *inter alia*, as a question presented to the Court, the following:

> I. Does the failure of a state statute to permit the inhabitants and/or the qualified electors of an area sought to be annexed to vote upon the question of annexation offend the equal protection clause of the Fourteenth Amendment?

This is precisely the question which the Petitioners in the present cause seek to present to this Court. In dismissing the appeal in *Bridges*, this Court stated:

> The motion to dismiss is granted and the appeal is *dismissed for want of a substantial federal question.*

(383 U.S. 574) (emphasis added).

Even if this Court had not considered this question prior to the filing of the petition herein, the question which Petitioners seek to review has also been presented and passed upon in the case of *Citizens Committee to Oppose Annexation v. City of Lynchberg, Virginia*, 400 F.Supp. 68 (W.D.Va. 1975), *aff'd in part, vacated in part, remanded*, 528 F.2d 816

(4th Cir. 1975), *injunction denied*, 96 S.Ct. 766 (1976). In that case, the plaintiffs brought an action seeking an injunction enjoining the enforcement of a state court decree ordering the annexation of portions of two counties in Virginia to the City of Lynchberg, Virginia. The plaintiffs also sought to enjoin the holding of elections pursuant to the court decree and requested an award of money damages. The United States District Court for the Western District of Virginia held, *inter alia*, that the Virginia annexation statute was not unconstitutional for any of the reasons alleged. With regard to the constitutionality of the Virginia statute, the Court stated at page 75:

> Plaintiffs' next claim is somewhat vague, but appears to be that citizens residing in the annexed area have a constitutional right to vote on annexation and the failure of the Virginia annexation statute to require their approval renders that statute unconstitutional. While citing the "privileges and immunities" and "due process" clauses, plaintiffs seem to place their principal reliance on the "equal protection" clause of the Fourteenth Amendment. In considering this claim, it must be remembered that Virginia, unlike a number of states, provides for a judicial procedure for the approval of annexations. Va. Code Ann. § 15.1-1032, *et seq.* (1973). Approval of annexations in Virginia is subject to a judicial determination that the specified statutory standards are satisfied and is not determined by the electoral process. Thus, plaintiffs' reliance on the Fourteenth Amendment apportionment cases is once more misplaced, for while it is perhaps arguable that there is an unconstitutional discrimination when annexations are approved by an electoral process from which annexed citizens are excluded, . . ., *there does not seem to be any basis for an equal protection claim when no one is granted the right to vote on the matter*. This leaves the plaintiffs the task of establishing a right to vote on annexations. However, there appears to be no statutory requirement and the Court fails to perceive such a right in the Constitution. . . .

(emphasis added).

The Court, citing *Hunter v. City of Pittsburgh*, *supra*, in support of its position that there is no statutory or constitutional right to vote on annexations, further said at page 76:

> . . . Although this sweeping language is subject to some exceptions, e.g., Gromilion v. Lightfoot, supra, it continues to be the law that states retain a broad discretion in regulating the boundaries of their political subdivisions, and there is no absolute constitutional right of citizens to vote on such matters . . . .

(citations omitted).

It should be noted that the Virginia annexation statutes, Va. Code Ann. § 15.1-1032 *et seq.* (1973), as

amended (Supp. 1974),[5] under scrutiny in the *Citizens Committee to Oppose Annexation v. City of Lynchberg, Virginia* case, *supra*, require that annexation by a city or town of adjacent area can only be accomplished through a judicial proceeding. In Mississippi this requirement must also be met to accomplish annexation. § 21-1-33 **Miss. Code Ann.** (1972).[6]

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5 Relevant portions of **Va. Code Ann.** § 15.1-1041 read as follows:

§ 15.1-1041. Hearing and decision. — (a) The court shall hear the case upon the evidence introduced as evidence is introduced in civil cases.

(b) The Court shall determine the necessity for and expediency of annexation, considering the best interests of the county and the city or town, the best interests, services to be rendered and needs of the area proposed to be annexed, and the best interests of the remaining portion of the county . . . .

6 Section 21-1-33 **Miss. Code Ann.** (1972) reads:

If the chancellor finds from the evidence presented at such hearing that the proposed enlargement or contraction is reasonable and is required by the public convenience and necessity and, in the event of an enlargement of a municipality, that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time, the chancellor shall enter a decree approving, ratifying and confirming the proposed enlargement or contraction, and describing the boundaries of the municipality as altered. In so doing the chancellor shall have the right and the power to modify the proposed enlargement or contraction by decreasing the territory to be included in or excluded from such municipality, as the case may be. If the chancellor shall find from the evidence that the proposed enlargement or contraction, as the case may be, is unreasonable and is not required by the public convenience and necessity, then he shall enter a decree denying such enlargement or contraction. In any event, the decree of the chancellor shall become effective after the passage of ten days from the date thereof or, in the event an appeal is taken therefrom, within ten days from the final determination of such appeal. In any proceeding under this section the burden shall be upon the municipal authorities to show that the proposed enlargement or contraction is reasonable.

The several cases cited by the Petitioners in support of their contention that Section 21-1-27 denies them equal protection as guaranteed by the Constitution, are the same type of "Fourteenth Amendment apportionment cases" relied upon by the plaintiffs in the *Citizens Committee to Oppose Annexation v. City of Lynchberg, Virginia* case, *supra*, and, therefore, do not deal directly with the proposition in point, *i.e.*, the grant and exercise of the power to annex adjacent territory without the consent of the inhabitants therein. These specific cases deal with various and sundry points of law. The majority, however, of the cases relied upon by the Petitioners, i.e., *Reynolds v. Sims*, 377 U.S. 533 (1963), *Dunn v. Blumstein*, 405 U.S. 330 (1972), *City of Phoenix v. Koldziejski*, 399 U.S. 204 (1970); *Evans v. Korman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969), and *Kramer v. Union Free School District*, 395 U.S. 620 (1969), are orthodox voting rights cases. The fact that the Petitioners do not have a right to vote on the annexation of the proposed annexation area is not the result of an invidious or suspect classification or any other act of overt discrimination. The Petitioners can in no way, in this case, show that they have been deprived of any benefits that would be due them, because of some unreasonable or unjustified classification. This case is, therefore, not a proper case for the application of the compelling state interest test in *Dunn v. Blumstein, supra*, as urged by the Petitioners in their brief. *See also, Garren v. City of Winston-Salem, North Carolina*, 463 F.2d 54 (4th Cir. 1972); and, *People ex rel. v. Village of North Barrington*, 94 Ill.App.2d 265, 237 N.E.2d 350 (1968).

The Respondent would submit that the equal protection clause of the Fourteenth Amendment only requires that the inhabitants of the annexing area and of the area annexed have an equal opportunity to participate in the annexation process. Section 21-1-31 **Miss. Code Ann.** (1972) affords such an equal opportunity with the requirement of a judicial determination as to whether or not the annexation is reasonable. Opponents and proponents alike may come before the Court and be heard concerning the annexation's reasonableness. Neither group of inhabitants has been afforded the right to vote upon the annexation. There cannot, therefore, be a violation of the equal protection clause of the Fourteenth Amendment where such a situation exists.

Petitioners infer, but never expressly state that since § 21-1-13 **Miss. Code Ann.** (1972) (incorporation of municipalities) and § 21-1-45 **Miss. Code Ann.** (1972) (inclusion or exclusion of territory) require a petition signed by two-thirds of the qualified electors residing in the areas affected by the particular statutes, the absence of such a provision in § 21-1-27 denies the inhabitants of the area proposed for annexation equal protection of the law as required by the Constitution. These three statutes apply to separate and distinct processes. As pointed out by the Mississippi Supreme Court, "there is 'a fundamental difference of some magnitude' between incorporation of an unincorporated area on the one hand and the extension of corporate boundaries on the other. *Hamilton v. Incorporation of Petal*, 291 So.2d 190 (Miss. 1974)." (336 So.2d 490, 492). Further, there was no showing by the Petitioners that the legislature's omission of the requirement of the approval by vote, by petition or

otherwise of the inhabitants of the area proposed for annexation was the result of some invidious or suspect classification or act of overt discrimination. It was the Mississippi Legislature that determined the manner in which adjacent unincorporated territory was to be annexed by municipalities. The Petitioners did not show, nor did they attempt to show, that the Legislature's determination was unreasonable and unjustified, or, that the State had used its power over municipal boundaries to circumvent a federally protected right. The Petitioners obviously may fashion a remedy to their "problem" in the form of new legislation. It is, however, submitted that the United States Constitution offers them no remedy.

CONCLUSION

Wherefore, for the foregoing reasons the Respondent most respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November, 1976, copies of this Brief of Respondent in Opposition were mailed, postage prepaid, to the attorney for Petitioners, John Arthur Eaves, Eaves and Eaves, 101 Plaza Building, Jackson, Mississippi, 39201.

I further certify that all parties required to be served have been served.

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